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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 813

RUTH BAWDEN,

Petitioner,

vs.

STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

	PAGE
Opinions of the courts below	1
Statement of the grounds on which the jurisdiction of this court is invoked	2
Questions presented for review	3
Statement of the case	3
Statutes involved	7
Statement of the evidence pertinent to this petition	7
Specifications of error	15
Statement of the proceedings at which and the manner in which the federal questions sought to be reviewed was raised	17
Summary of argument relied upon for allowance of the writ	18
Argument	20
I. The search of the premises of Mrs. Bawden, your petitioner, and the seizure of a telephone book and memorandum and the use thereof thereafter in the trial was error. The search was unlawful. It violated both the Fourth and Fifth Amendments to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, as well as Article I, Section 19, of the California Constitution, and it was in direct conflict with the rules laid down in the case which established the unlawfulness of searches without the benefit of a search warrant or incident to a valid arrest, as set forth in People v. Cahan, 44 Cal. 2d 434, 292 P. 2d 905. It was in violation of the Constitution of the United States as held in Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081	20
Conclusion	27

TABLE OF AUTHORITIES CITED

CASES

Agnelo v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145 19

Elkins v. United States, 364 U. S. 216 ..... 23, 24, 25

Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 694, 6 L. Ed. 2d 1081 ..... 3, 16, 19, 25, 26

People v. Buffum, 40 Cal. 2d 709, 256 P. 2d 317 6

People v. Cahan, 44 Cal. 2d 434, 292 P. 2d 905 ..... 16, 19, 23, 25, 26

STATUTES

California Constitution, Art. I, Sec. 19 15

California Penal Code, Sec. 182 7

California Penal Code, Sec. 274 ..... 4, 7

California Penal Code, Sec. 995 ..... 4, 16, 17

California Penal Code, Sec. 1111 6

California Penal Code, Sec. 1324 8

United States Code, Title 28, Sec. 1257(3) 3

United States Constitution, Fourth Amendment 2, 3, 15, 25, 26

United States Constitution, Fifth Amendment 2, 3, 15, 25, 26

United States Constitution, Fourteenth Amendment 2, 3, 25

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petition of Ruth Bawden for a Writ of Certiorari to the State of California and the District Court of Appeal, Second Appellate District, State of California, respectfully seeks to review a judgment of the District Court of Appeal, Second Appellate District, State of California, made and entered by said Court on the 16th day of October, 1962, a copy of which is hereto appended and marked Exhibit "A", and the Petitioner respectfully represents to this Honorable Court:

Opinions of the Courts Below.

The Trial was by the Court sitting without a jury. No Opinion was rendered by the Trial Court.

The Opinion of the District Court of Appeal, Second Appellate District, State of California, has been report-

ed officially at 208 A. C. A. 642 and in 25 Cal. Rptr. 368. A copy of the opinion rendered by the said Court is annexed to this Petition as Appendix "A". A copy of the Opinion is also a part of the record on file with the Clerk of this Court.

No Opinion was rendered by the Supreme Court of California. Hearing by said Court was denied, pursuant to the filing of a Petition for a Hearing in said Court after decision by the District Court of Appeal, the said District Court of Appeal being an intermediate Appellate Court in the said Official Court System of the State of California. The Minute Order of the Supreme Court, denying Hearing after judgment by the District Court of Appeal, is reported in 58 A. C. Minutes, dated December 12, 1962, page 2 of minutes of December 21, 1962 advance sheets.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

There was no order respecting a rehearing before the Supreme Court, it having denied without opinion the Petition for Hearing. The Trial Court has granted until February 15, 1963, a stay of execution to permit your petitioner to proceed to this Court by way of certiorari. No order granting an extension of time within which to file Petition for Certiorari has been applied for or granted. The case is one involving introduction in the State Court of evidence secured by an unlawful search and seizure in violation of the Fourth and Fifth Amendments and Fourteenth Amendment to the Constitution of the United States.

The statutory provision believed to confer jurisdiction upon the Court to review the judgment of the Court

below is United States Code, Title 28, Section 1257(3). Hereinafter, the Clerk's Transcript is referred to as C. T., the Reporter's Transcript as R. T.

Questions Presented For Review.

1. Where police officers acting without a search warrant and without a warrant to arrest and acting without reasonable or probable cause to search, arrest and seize, enter the home of the accused, your Petitioner, and without warning and without permission seize a document, particularly a telephone book which contains numbers and said telephone book containing said numbers are received in evidence against the accused, your Petitioner, have the rights of the accused in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States been violated?

It is our contention that *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 694, 6 L. Ed. 2d 1081, is controlling.

Statement of the Case.

Ruth Bawden, the appellant, together with Leon Greenhill, Edith Dyer, and Walter Dyer aka Danny Dyer, were charged in Indictment No. 227 390, in the Superior Court of the State of California, with the crime of conspiracy in Count I,[1] and in Counts II to[2]

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[1] "Section 182. CONSPIRACY DEFINED. If two or more persons conspire: 1. To commit any crime."

[2] "Section 274. ABORTIONS. DEFINITIONS AND PUNISHMENT. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

XV with the crime of abortion in violation of Section 274, Penal Code of California.

Ruth Bawden, the appellant herein, is named in Count I, Conspiracy; Count VI, abortion, in violation of Section 274, Penal Code; and Count XIII, violation of Section 274, Penal Code, abortion. The other defendants named in Count I, and in the heading, were charged in the other counts with the substantive offense of abortion.

As to the other defendants, the Indictment was disposed of by pleas. No trials were had as to them. Ruth Bawden entered a plea of not guilty and proceeded to trial [Indictment 402 419, Clk. Tr.].

A motion pursuant to Section 995, Penal Code, as to Ruth Bawden, was made, and by the Court denied [C. T. 424-426].

Thereafter, a plea of not guilty was entered, and the matter was set for trial [C. T. 426].

Thereafter, the defendant-appellant waived trial by jury and consented to be tried by the Court. The case was submitted on a digest of the transcript, and the testimony before the Grand Jury, reserving the right to make and offer additional evidence.

Thereafter, Judge Fox, to whom the case had been assigned, declared a mistrial by consent and all of the parties [C. T. 434]. The case was assigned to another Judge of the Superior Court and the case, after being reset, was called for trial and the defendant and all counsel waived jury trial. It was then stipulated the cause could be submitted on the testimony contained in the transcript of the proceedings had at the Grand Jury Hearing, subject to the Court's rulings, with each side

reserving the right to offer additional evidence. Thereafter, the matter came on to be tried, evidence was offered, witnesses sworn and testified, the cause was argued, and the Court found the defendant-appellant guilty of Counts I, VI and XIII [C. T. 439-B]. Thereafter, the defendant was sentenced to the California Institution for Women for the term prescribed by law on Counts I, VI and XIII, concurrently; said sentences to run concurrently with the sentences in Case No. 211 284, Counts I and II, upon which counts in said case the defendant had been convicted and was on probation; probation was revoked, and the sentences ordered enforced.

Notice of Appeal was filed. An appeal was taken from both the judgment and the order denying the motion for new trial, and from the order revoking probation in Case No. 211284 [C. T. 440, in Case No. 227390, and C. T. 19 in Case No. 211284]. These appeals were conducted together for the basis for revoking probation with the conviction in Case No. 227 390, and it was and is our contention that, if the judgment and order appealed from in 227 390 was or is reversed, in that event the judgment revoking probation should be set aside, and the matter returned to the Superior Court for further proceedings pursuant to the original order and judgment in Case No. 211 284.

The Indictment in Case No. 227 390, as against Ruth Bawden, charged that on or about the 24th day of February, 1959, in the Superior Court of the State of California, in and for the County of Los Angeles, she was convicted of the crime of conspiracy, a felony [C. T. 420, Case 227 290].

The appeal was duly taken to the District Court of Appeal and the judgments appealed from affirmed (See copy of the opinion, Appendix "A"). Thereafter, a Petition for Hearing in the Supreme Court of the State of California was duly filed and, without opinion, it was denied December 12, 1962 (See Minutes, Supreme Court, 58 A. C., dated December 21, 1962, page 2 of Minutes).

Thereafter, the matter was referred to the Superior Court, and the trial court granted a stay of execution and a continuance of further proceedings to permit the filing of this Petition for Certiorari to the Supreme Court of the United States. In the Trial Court, and before the District Court of Appeal, the petitioner contended the evidence was not sufficient to establish any of the counts of which the defendant-appellant stands convicted. We further contended there was no corroboration sufficient to meet the requirements of the law. We contended that the evidence of the accomplices was not corroborated. The evidence consisted largely of women involved in the transactions and, notwithstanding our contentions, the Court ruled against us. We relied upon[3] Penal Code, Section 1111. We relied on *People v. Buffum*, 40 Cal. 2d 709, 720, 256 P. 2d 317. But both the trier of fact and the District Court of Appeal ruled against us. By reason of this, we come

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[3]Penal Code, Section 1111, provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

to this Court on the sole question of the unlawful search and seizure, respectfully contending that it presents a solid Federal question and an invasion of the constitutional rights of the Petitioner.

Statutes Involved.

(1) California Penal Code, Section 182, Conspiracy defined. If two or more persons conspire: 1. To commit any crime.

(2) California Penal Code, Section 274:

> "§274. [Providing or administering drug or employing means to procure miscarriage: Punishment.] Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years. [Enacted 1872; Am. Stats. 1935, p. 1605.]"

Statement of the Evidence Pertinent to this Petition.

The evidence consisted largely of the testimony of a number of women who had contacted certain people and went upon a yacht lying in the harbor off Los Angeles, and there submitted to some type of operation. Most of them were unable to describe the details thereof, but stated that they believed themselves to be pregnant and thereafter were restored to regularity. Evidence pertinent to the point raised herein is as follows:

Charles J. Hille testified he participated in the arrest of Ruth Bawden on February 24, 1960; he identified

Exhibit 24-A, a telephone book recovered from the telephone stand in the residence of Ruth Bawden; he said at the time they took the book, Mrs. Bawden said, why do you want the book, and he said it was a part of the evidence they were gathering concerning telephone contacts; it was part of their investigation [R. T. 348, 349]. She said, "Well, you won't need this book because I haven't done anything along those lines since you arrested me last." [R. T. 349]. He said he told her it was a part of their investigation and they were going to take the book [R. T. 349]. He noticed the number TErminal 4-4559; Exhibit 24B and a small business card, Exhibit 24C, were found in this book [R. T. 250]; the book was recovered from the telephone table at 5148 Hermosa Street, Eagle Rock, Los Angeles [R. T. 350].

Leon Greenhill was called; an order was filed requiring him to testify pursuant to Section 1324 of the Penal Code of California [R. T. 8, March 27, 1961]. Greenhill stated he was a defendant in the same Indictment; he entered a plea to two counts; he was sentenced to the State Prison [R. T. 9, March 27, 1961]. He stated he knew Ruth Bawden; that on January 6, 1960, he caused Dorothy Jean Faulkner to have a miscarriage, on the yacht WESTERLY, in San Pedro Harbor [R. T. 10, June 15, 1961]; he was given Dorothy Jean Faulkner's name by Ruth Bawden; he was given the name over the telephone. Ruth Bawden gave him a telephone number and he called Miss Faulkner; he was paid for it; he gave approximately half of the money to Ruth Bawden after the expenses were taken off. On January 22, 1960, he performed an abortion on a person named Valerie Chaille [R. T. 11, June

15, 1961]; it took place on the yacht WESTERLY; he was given the name of Valerie Chaille and her mother, who was Mrs. Springer, by Ruth Bawden; he phoned Mrs. Springer and arranged for the abortion; he was paid for it; he gave approximately half of the money to Mrs. Bawden after the expenses [R. T. 12, June 15, 1961].

On cross-examination, Leon Greenhill stated he had been a member of the United Public Health Service and was allowed to practice medicine [R. T. 13, June 15, 1961]; that prior to going to State Prison he had been convicted of performing abortions; said he had no feelings towards Mrs. Bawden, likes or dislikes [R. T. 14, June 15, 1961]. He stated that prior to testifying he had a conversation with the District Attorney [R. T. 15, June 15, 1961]. He denied stating to Dorothy Jean Faulkner that Ruth drank too much, and that she caused too much trouble [R. T. 16, June 15, 1961]. He stated he had pled guilty to two counts in this case, plus the violation of probation [R. T. 17, June 15, 1961]. He was shown Exhibit 25B, and he stated that the entries in that book were kept by the people on the boat [R. T. 20, June 15, 1961].

Fred L. Mitchell testified he was a police officer for the City of Los Angeles; he had previously testified before the Grand Jury in this same proceeding; he arrested Mrs. Dyer and her husband aboard the yacht WESTERLY; he had been watching the boat and investigating it for some two months. He then testified on the question of search and seizure [R. T. 24, June 15, 1961] as follows:

"The Witness: Enroute to the Police Administration Building, I questioned Mrs. Dyer as to how

she and her husband became involved in this abortion operation, and she stated that she and her husband had been employed at a defense plant in El Monte approximately one year previous to this date of arrest, that her sister became pregnant and desired to terminate the pregnancy and that she had inquired of a fellow employee at this defense plant and he had given her a Cleveland telephone number and she had been told to call this number and ask for Ruth, that she did call this number and she talked to a woman who identified herself as Ruth, informed this Ruth that she desired to arrange an abortion for her sister, a woman by the name of Louise Wallace, that the person who identified themselves as Ruth told her that she would arrange it and that she would call her back, that she waited about a week and she didn't receive a call from this Ruth, and she contacted the fellow employee that had given her the name and number and he said, 'Well, I will give you the name and telephone number and you contact her again.'

She stated that she did contact a Ruth Bawden at a Cleveland telephone number, that the person that identified themself as Ruth Bawden apologized for not calling her back and stated that she would take care of it immediately, that she took her name and telephone number and that a short time later she received a call from a person who represented himself to be 'the doctor' that they arranged for her to bring her sister to a rendezvous which she did and she said that there she met Dr. Greenhill and an abortion was performed upon her sister.

I related this information to my lieutenant upon arriving at the Police Building and he immediately ordered Sergeant Le Page and Hille to go to the residence of Mrs. Bawden and to place her under arrest."

He related to his superior, Lt. Brown, the information he had received from Mrs. Dyer [R. T. 25, 26, June 15, 1961]; said he had never received any prior information from the Dyers; he stated he did not believe the officers who arrested Mrs. Bawden had a warrant for her arrest [R. T. 26, June 15, 1961].

It was then stipulated that at the time of arrest *there was no search warrant* [R. T. 27, June 15, 1961], or *warrant for the arrest.* He stated that he had been investigating Ruth Bawden and actually the only basis he had, beside the information he received from the Dyers, was a suspicion throughout the investigation that perhaps Ruth Bawden was behind this, or had something to do with it. He had no concrete evidence [R. T. 28, June 15, 1961]. Prior to talking to the Dyers, he had no concrete evidence that Mrs. Bawden was involved with the abortion of a Miss X or a Miss Y, just suspicion that she was involved [R. T. 28, June 15, 1961].

The officer further stated that in their investigation there were two phone calls made from the yacht to Mrs. Bawden's home [R. T. 33, June 15, 1961]; these calls were reflected by the records of the phone company [R. T. 33, 34, June 15, 1961].

Paul Le Page, called as a witness on behalf of The People, stated he was a police officer assigned to Homicide; he was one of the officers who arrested Ruth

Bawden [R. T. 35, June 15, 1961]. The arrest was made on February 24, 1960, at 7:30 a.m., at her residence, 5148 Hermosa Avenue; they had several bits of information, the first being their investigation of long standing; they had two phone checks which indicated she had been in communication with two suspects; she was acquainted with the person who was performing the abortions [R. T. 36, June 15, 1961]. Sergeants Mitchell and Galino brought Walter and Edith Dyer in from the harbor under arrest, and related to them the Dyers had explained to them that Ruth Bawden was the engineer [R. T. 36, June 15, 1961]. He stated he had no knowledge of the conversations which took place on the two phone calls that were made between the boat and Mrs. Bawden's home; he didn't even know who spoke on the boat; he did not know that Mrs. Bawden was on one end of the line [R. T. 37, 38, June 15, 1961]. They went to her house, arrested her, searched the house [R. T. 38, June 15, 1961]; they found a telephone directory, her personnal address book and slips of paper which they thought were of evidentiary value [R. T. 38, June 15, 1961]; they had never received any prior information from the Dyers [R. T. 39, June 15, 1961]. He opened the drawers in the small tables in her living room and removed most of the articles from there; they were end tables in the living room [R. T. 39, June 15, 1961]. He knew of abortions being performed on the boat, and he knew the defendant Greenhill [R. T. 39, 40, June 15, 1961]; he had personally never seen Mrs. Bawden around the boat [R. T. 39, 40, June 15, 1961]; his fellow officers had told him that they had never seen Mrs. Bawden around the boat [R. T. 39, 40, June 15, 1961].

Ruth Bawden, called as a witness in her own behalf, testified she was 61 years of age; that she had been previously convicted of violation of Section 274, Penal Code, which deals with abortions [R. T. 42, June 15, 1961]; she knew the defendant Leon Greenhill; about two years ago she had been involved with Greenhill in the abortion business; she heard him testify that she had referred Dorothy Jean Faulkner and Valerie Chaille to him. She testified she never referred these two women to Greenhill. Dorothy Faulkner's boy friend, Margolis, had called her house and talked with her brother; he left his number; then Dorothy Faulkner phoned and left her number, and she wrote it down. When Margolis called he told her that some sort of a crazy person had answered the phone; that was her brother; he was confused. Margolis said he had a girl friend who was in trouble, wanted to know where Dr. Greenhill was. She stated that she told him if he wanted to get a hold of him, Greenhill, call the number he used to have before he moved, "I have nothing more to do with him." [R. T. 44, June 15, 1961]. This was her conversation with Margolis. She called neither Dr. Greenhill nor anybody connected with the boat; she did not tell them about Dorothy Jean Faulkner [R. T. 44, June 15, 1961]; she never called Greenhill or anybody else concerning Valerie Chaille [R. T. 44, June 15, 1961]; she never called the boat or referred anyone to them about abortions [R. T. 44, June 15, 1961]. She testified there were hard feelings between she and Dr. Greenhill [R. T. 45, June 15, 1961]. Other than the charges of which she had been convicted or plead guilty the last time she was in Court, she had never referred any abortions to Greenhill [R. T. 45, June 15, 1961],

nor to anybody else connected with the boat [R. T. 46, June 15, 1961]. Mrs. Dyer had called her; she insisted Mrs. Dyer called her because her name was being used in connection with the boat and she resented it [R. T. 46, June 15, 1961]; they were using the name "Ruth" down there as a nurse who was assisting the doctor; she knew nothing about their activity and when she heard they were using her name she said she was going to put a stop to it; she had told Mrs. Dyer that if she ever used her name she would turn them in [R. T. 46, 47, June 15, 1961]. She had never received any money from Greenhill except when they worked together more than two years previous [R. T. 47, June 15, 1961]. She testified she had received some money from Dr. Greenhill's wife by Western Union; it was a loan that she made his wife; she gave her $350.00; Mrs. Greenhill had come over to her house, she needed money to have her little girl's teeth treated, and the witness said she and her brother loaned her the money. She denied ever receiving any money from Greenhill for referring people to him to be aborted [R. T. 48, 49, June 15, 1961]. Valerie Chaille had called her house, talked to her brother, and then to her cousin [R. T. 49, 50, June 15, 1961]. She wanted to know if the witness was in contact with the doctor and if she had a telephone number. She didn't give her one. Dr. Greenhill had called her. She said Mrs. Springer called her and wanted to know if that was the right number for Dr. Greenhill [R. T. 50, 51, June 15, 1961].

On cross-examination, she stated that she had talked with Margolis and he said that he had had about ten of them pregnant, and he wanted to get in touch with the doctor, that the doctor had taken care of two or

three for him. He wanted to know if the doctor still had the same number, and she said, "Well, you can try it. I don't know." [R. T. 51, June 15, 1961]. She stated Exhibit 24B was her handwriting. Her brother told her it was Jean Faulkner's name, it was hardly legible; her brother didn't write well, so she wrote it down. At the time she wrote it down, she didn't know it was coming from Margolis [R. T. 52, June 15, 1961]. Her brother told her, "This woman is going to call you." She stated that the Faulkner woman had called her after this had been done, and she told her Dr. Greenhill had told her, "We have nothing to do with Ruth Bawden any more." [R. T. 52, June 15, 1961]. She knew Peggy Cannon; had known her for ten years; she called and wanted to know about the doctor she used to work with, and some man on the Times knew, she wanted to know if he was an honest to goodness doctor, and she stated as far as she knew he had a license in Arizona [R. T. 33, June 15, 1961]. She testified the number, TErminal 4-4559, on the front page of Exhibit 24A, the book of phone numbers, was a number that had been given to her; it was the number of the Dyers; she had never called them; she had told Ruth Hayes to have her call, and she had called and told her to stop using her name [R. T. 54, June 15, 1961].

Specifications of Error.

1. Search of the premises of the home of Mrs. Bawden, your Petitioner, and the seizure of a telephone book and memorandum and the use thereof in the trial was error. The search was unlawful. It violated both the Fourth and Fifth Amendments to the Constitution of the United States, Article I, Section 19, of the Cali-

fornia Constitution, and it was in direct conflict with the rules laid down in the case which established the unlawfulness of searches without the benefit of a search warrant or incident to a valid arrest, *People v. Cahan*, 44 Cal. 2d 434, 292 P. 2d 905. It was in violation of the rules laid down in *Mapp v. Ohio*, 367 U. S. 343. The motion was brought to the attention of the Court pursuant to Section 995 of the Penal Code of the State of California [C. T. 422-A]. Motion was made and by the Court denied [C. T. 426]. Again, the matter was brought to the Court's attention [R. T. Supp. 41], at the time of the trial itself:

> "Mr. Gritz: Well, yes, before she takes the stand I'd like to make a motion to suppress the evidence that was found in her home on the basis of the fact that I believe it was found as a result of an illegal arrest and any search pursuant to that arrest is unlawful. May I be heard for just a moment on that, your Honor?
>
> "The Court: Yes.
>
> "Mr. Gritz: Thank you, sir.
>
> "The police officers state that the basis of their ordering her placed under arrest or going to arrest her as a fact is what the Dyers told them. They had never known the Dyers before. The Dyers had never given them any information so we cannot call the Dyers reliable informers in that they have given information before which has been checked out. Based on what the Dyers had told them, not reliable informers or even if they are called co-conspirators, nothing they have said before had been checked out and based on that and

the fact that two phone calls had been placed to the boat and Mrs. Bawden's home, the officers stated they didn't know what parties spoke, don't know if Mrs. Bawden was one of them, based on that that seems to be the only reason going to her house and placing her under arrest. That's been stated a couple of minutes ago. And I feel that does not give them probable cause for the arrest and the following search.

"I will submit the matter to the Court.

"The Court: Thank you. The motion is denied."

A motion for new trial was made, at which time the unlawful search and seizure was again called to the Court's attention. The motion for new trial was denied [C. T. 440].

Statement of the Proceedings at Which and the Manner in Which the Federal Questions Sought to Be Reviewed Was Raised.

Objections were made in the trial court on the motion pursuant to Section 995 of the Penal Code.[4] This section provides for a motion to dismiss prior to trial [C. T. 422-A]. The motion was made and by the Court denied [C. T. 426]

The matter was again brought to the Court's attention [R. T. Supp. 41] at the time of the trial itself, where one of counsel for the Petitioner made a motion to suppress the evidence. The matter was again brought

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[4]Section 995, Penal Code:

to the Court's attention after conviction and at the time of the motion for new trial, at which the unlawful search and seizure was again called to the Court's attention and a motion for new trial was made, and by the Court denied [C. T. 440]. It was, of course, urged again before the District Court of Appeal, as is indicated by the Opinion of the District Court of Appeal, Appendix "A". It was also brought to the Court's attention by way of the Petition for a Hearing in the Supreme Court of the State of California, which was by that Court denied. The Petition for Hearing in the Supreme Court of California is contained in the record on file herein.

Summary of Argument Relied Upon for Allowance of the Writ.

This Petition is of course of grave importance to the Petitioner. More than that, it is of importance that the rights of citizens be protected and that the obedience of the States to the mandates of the Constitution of the United States, their own Constitutions, and the rulings of this Court, be observed. It is true that the co-defendant charged in the case pled guilty and were apparently involved in some agreement between themselves to conduct abortions upon a boat lying in the Harbor off Los Angeles. The Petitioner had been convicted of an involvement before and knew some of the parties, and her telephone number was found in a book, we contend was unlawfully seized at her home. We contend that the seizure was benefit of a search warrant and without a warrant of arrest, and without probable

cause, was unlawful and the decision of the learned District Court of Appeal is in violation of the decision rendered by the Supreme Court of California in *People v. Cahan* (1955), 44 Cal. 2d 434, 282 P. 2d 905, which was a momentous decision and reversed the law as it had been with reference to searches and seizures in California for more than half a century. In *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, it was held:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is by that same authority inadmissible in a State Court."

See also *Agnello v. United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, where this Court held:

> "Belief however well founded that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant, and such searches are . . . . unlawful, notwithstanding facts unquestionably showing probably cause."

ARGUMENT.

I.

The Search of the Premises of Mrs. Bawden, Your Petitioner, and the Seizure of a Telephone Book and Memorandum and the Use Thereof Thereafter in the Trial Was Error. The Search Was Unlawful. It Violated Both the Fourth and Fifth Amendments to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, as Well as Article I, Section 19, of the California Constitution, and It Was in Direct Conflict With the Rules Laid Down in the Case Which Established the Unlawfulness of Searches Without the Benefit of a Search Warrant or Incident to a Valid Arrest, as Set Forth in People v. Cahan, 44 Cal. 2d 434, 292 P. 2d 905. It Was in Violation of the Constitution of the United States as Held in Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.

While we have summarized the evidence, we think a short summary at this point is pertinent to the question.

Officer LePage, of the Los Angeles Police Department, testified he was one of the officers who arrested the defendant-appellant on February 24, 1960, at approximately 7:30 a.m. He said they had several bits of information; they had been making an investigation of long standing; he had two phone checks which indicated she was in communication with two of the suspects where the abortions were taking place. They knew from previous investigation that Mrs. Bawden was acquainted with the person who was actually performing the abortions aboard the boat [R. T. 35, 36, June 15,

1961]. At about 5:00 a.m. that morning, Sergeants Mitchell and Galinda had brought in two suspects, Walter and Edith Dyer, from the harbor; they were under arrest. The Dyers had told them there were several people involved in this matter and at the head of it was Ruth Bawden [R. T. 37, June 15, 1961]. He stated he had no knowledge of the conversations which took place on the two phone calls that were made between the boat and Mrs. Bawden's residence [R. T. 37, June 15, 1961]. He did not know that Mrs. Bawden had even spoken to anybody on the boat; he did not know who was at the end of the line [R. T. 38, June 15, 1961]. He had received orders from Lt. Brown to go and arrest Mrs. Bawden. They went to the house, searched the house, and arrested her. They brought in telephone directories, her personal address book, and slips of paper, which they felt were evidentiary. They searched the living room [R. T. 37, 38, June 15, 1961]. He stated he had never seen the Dyers before in his life. He opened the drawers in a small end table in the living room and removed most of the articles therefrom [R. T. 39, June 15, 1961]. They knew that abortions were being performed aboard the boat; he ecognized the defendant Greenhill, who was known to them [R. T. 39, 40, June 15, 1961]. He had arrested Bawden with Greenhill in 1958. He had never seen Mrs. Bawden around the boat [R. T. 39, 40, June 15, 1961]. None of his fellow officers had told him that she had been seen around the boat. In fact, he had been told she was not seen around the boat [R. T. 40, June 15, 1961].

Fred L. Mitchell testified he was a police officer with the Los Angeles Police Department; that he had the Dyers and the yacht WESTERLY under investigation

for some time [R. T. 22, 23, June 15, 1961]; that he transmitted some information pertaining to Ruth Bawden to his fellow officers; that he had not actually participated in the arrest [R. T. 23, June 15, 1961]. After arresting the Dyers, he talked with Mrs. Dyer as to how she and her husband became involved in the abortion operations. She stated she had been employed at a defense plant in El Monte approximately a year previous; that her sister became pregnant; that she talked to a fellow employee at the defense plant about this; he gave her a Cleveland telephone number; she was told to call the number and ask for Ruth. She called the number, talked to some woman; told her she desired to arrange for an abortion for her sister, a Louise Wallace. The woman answered to the name of Ruth, and said she could arrange it; said she would call her back. A week or more passed; she did not hear from her; she called this number again; the woman identifying herself as Ruth took her telephone number, and some time later she received a phone call from a person who said he was the doctor. They arranged to meet; she then met Dr. Greenhill [R. T. 25, June 15, 1961]. He related this information to his lieutenant upon arriving at the Police Building, and the lieutenant immediately ordered Sergeants Le Page and Hille to go to the residence of Mrs. Bawden and place her under arrest [R. T. 24, 25, June 15, 1961]. Prior to the date of this arrest, he had not talked to the Dyers, and neither had Lt. Brown, so far as he knew [R. T. 25, 26, June 15, 1961]. So far as he knew, neither Galindo nor Le Page had a warrant for her arrest.

It was *then stipulated that there was no warrant for the arrest of the appellant Bawden, nor a search war-*

rant [R. T. 27, June 15, 1961]. *He stated that actually the only information, besides that given to him by the Dyers, that he had concerning Ruth Bawden's activities was a "running suspicion." [R. T. 28, June 15, 1961]. He had no concrete evidence that she was involved* [R. T. 28, June 15, 1961]. The only suspicion he had was police information that had come to them over the years; they had known about Ruth Bawden for ten years [R. T. 28, June 15, 1961]. He said that prior to the conversation with the Dyers, *he had no concrete evidence that Mrs. Bawden was involved with the abortion of these women, just suspicions that she was involved* [R. T. 28, June 15, 1961].

It is our contention that there was not probable cause for the arrest or the search. There was no warrant of arrest; there was no search warrant. This was stipulated to. It was a violation of the rules laid down in *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905. *People v. Cahan* is now the settled rule in California, and has been approved as late as June 27, 1960, by the Supreme Court of the United States, in *Elkins v. United States,* 364 U. S. 216, where the Court said:

> "The experience in California has been most illuminating. In 1955 the Supreme Court of that State resolutely turned its back on many years of precedent and adopted the exclusionary rule. *People v. Cahan,* 44 Cal. 2d 434, 282 Pac. 2d 905. 'We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions

on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court.' 44 Cal. 2d 434, at 445, 282 Pac. 2d 905, at 911, 912, 913."

In *Elkins v. United States, supra,* the Supreme Court of the United States said this:

"The chief law enforcement officer of California was quoted as having made this practical evaluation of the *Cahan* decision less than two years later:

'The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice.'

The above is an excerpt from a letter of Edmund G. Brown, then Attorney General of the State of California, to the Stanford Law Review, quoted in Note 9, Stan. L. Rev. 515, 538 (1957). See also Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan, 43 Cal. L. Rev. 565, 586-588 (1955)."

Further, the United States Supreme Court, in *Elkins v. United States, supra,* said:

> "The movement towards the rule of exclusion has been halting but seemingly inexorable. Since the Wolf decision one state has switched its position in that direction by legislation (North Carolina) and two others by judicial decision (Delaware and California)."

Of course, California did this by reason of the *Cahan* decision, *supra.*

Next, we come to the decision of *Mapp v. Ohio,* 367 U. S. 343. Clearly, the Supreme Court, in the *Mapp* decision, intended that the same constitutional standards as required of Federal Officers by the Fourth Amendment to the Constitution must be applied to the States by way of the Fourteenth Amendment to the Federal Constitution. The effect of the Mapp decision is that the exclusionary rule is of constitutional origin, and as such it is a command of the due process clause of the Fourteenth Amendment upon the Courts of the States to exclude in criminal trials all unconstitutional evidence obtained as a result of an "unreasonable search." It further appears to be the ruling of *Mapp v. Ohio, supra,* that "the exclusionary rule" will be enforced by the Supreme Court as strictly against the States as it is against the Federal Government.

Mr. Justice Black, in his concurring opinion, said that in his opinion he felt the decision would better rest on the "interplay" between the Fourth Amendment's prohibition against unreasonable searches, and the Fifth Amendment's privilege against self-incrimination.

As Mr. Justice Black stated, in *Mapp v. Ohio, supra:*

> "Reflection on the problem however, in the light of cases coming before the court since Wolf, has led me to conclude that when the Fourth Amendment's ban against unreasonable search and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."

A learned discussion of search and seizure, a discussion of the *Cahan* case, and *Mapp v. Ohio,* is to be found in a document entitled "The Pleader", issued by the Kings County Criminal Bar Association, further entitled, "A Comment On The Law of Search And Seizure", by Nathan R. Sobel, County Judge, Kings County.

It is our contention that the unlawfully seized evidence was of a damaging character; that while it was purely circumstantial, there being no evidence that Mrs. Bawden had been called by any particular person, and that any of the complained of acts had been discussed, nevertheless, it was a turning factor, we believe, in the conviction of Mrs. Bawden, and she was thus denied substantial constitutional rights against unlawful search and seizure, the use of evidence thus obtained, and the rules against self-incrimination, as laid down in the Fifth Amendment to the Constitution of the United States. The use of the unlawfully obtained evidence was a violation of the due process clause of the Federal Constitution, the Fourth Amendment.

Conclusion.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the State of California to the end that the judgment of the District Court of Appeal, Second Appellate District, of the State of California, and the order by the Supreme Court of the State of California denying a Hearing, may be reviewed and to the end that they be reversed and the judgment of the trial court, the Superior Court of the State of California, be reversed.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner, Ruth Bawden.

EDWARD I. GRITZ,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 813

RUTH BAWDEN,

Petitioner,

vs.

STATE OF CALIFORNIA.

Appendix A to Petition for Writ of Certiorari.

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APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Four:

The People, Plaintiff and Respondent, vs. Ruth Bawden, Defendant and Appellant. 2d Crim. No. 8060 and No. 8061.

Filed October 16, 1962.

Consolidated Appeals from judgment of conviction of the Superior Court and from orders denying motion for new trial, revoking probation and sentences pronounced therein. Frederick W. Mahl, Jr., Judge. Affirmed.

Prosecution for abortion and for conspiracy to commit abortions. Judgment of conviction, orders denying motion for a new trial and revoking probation and judgment pronounced therein affirmed.

Russell E. Parsons for Ruth Bawden, Defendant and Appellant.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, George W. Kell, Deputy Attorney General, for Plaintiff and Respondent.

The grand jury returned an indictment charging defendant in Counts VI and XIII with abortion in violation of Section 274 of the Penal Code, and with conspiracy, with several codefendants, to commit abortions, in violation of Section 182, subdivision 1, of the Penal Code. As to the conspiracy, twelve overt acts were charged. A prior conviction of abortion and one of conspiracy to commit abortion were alleged against defendant. The indictment charged codefendants with

similar offenses all of which were disposed of by pleas and without a trial.

Defendant made a motion pursuant to Section 995 of the Penal Code which was denied. A plea of not guilty was entered and the matter was set for trial. Trial was by court, trial by jury having been duly waived. The cause, pursuant to stipulation of defendant and all counsel, was submitted to the court on the testimony contained in the transcript of the proceedings had before the grand jury, with both sides reserving the right to present further testimony. Additional testimony was offered, and defendant testified in her own behalf. Defendant was found guilty as charged; the prior convictions were found to be true as alleged; probation was denied; and defendant was sentenced to state prison for the term prescribed by law on each of the counts charged against her with the terms to run concurrently.

The court made a finding that defendant was in violation of probation. Probation was revoked, and defendant was sentenced to state prison for the term prescribed by law on each of two counts, one of abortion and the other of conspiracy to commit abortion, to run concurrently with each other and concurrently with the sentences in the other case.

Defendant prosecutes this appeal from her conviction, the order denying motion for new trial, the order revoking probation and the judgment pronounced therein.

A summary of the evidence pertinent to the contentions of defendant on this appeal reveals that one Dorothy Jean Faulkner, believing herself to be pregnant, on or about December 15, 1959, discussed her

condition with Allan Margolis and asked him to arrange for some help. She testified that on January 5, 1960, she received a telephone call from a woman who identified herself as "Ruth." The woman calling over the telephone commented to her, "You have a problem", and she told her that someone else would call. Later another woman telephoned her and identified herself as "Edith", the doctor's nurse, and she told her that the price of an abortion would be $450. On January 6, 1960, she went to the Seaside Hospital where she met Edith who escorted her to a yacht at an anchorage. Codefendant Greenhill (not appealing here), and a man called Danny also boarded the yacht, and after they put out to sea, Greenhill performed an abortion on her. During the return trip she gave Danny $450 in currency.

Allan Margolis was granted immunity from prosecution by the court and was ordered to testify. He stated that in the latter part of December 1959 he discussed Miss Faulkner's pregnancy with her and agreed to arrange an abortion for her. He had previously gone to defendant, Ruth Bawden, to arrange for an abortion on another girl which had been performed at defendant's home. He called defendant at the same number he had called previously, CLinton 5-6749, and he recognized the answering voice as that of defendant. He told her that he wanted to proceed with an abortion for Miss Faulkner and they made arrangements to set up a date for it. He learned later that the arrangement had not gone through, and in the meantime Miss Faulkner arranged for the abortion herself. He testified that he had provided the $450 paid by Miss Faulkner for her abortion.

Valerie Chaille testified after an order of the court granting her immunity from prosecution. She related that in the early part of January 1960 believing herself to be pregnant she discussed the matter with her mother and decided to terminate the pregnancy. On January 22, 1960, she went to a parking lot with her mother where they met "Edith" who escorted them to a yacht anchored at Long Beach. Danny Dyer was the operator of the boat, and the abortion was performed by Greenhill aboard the yacht.

Marian Springer, Valerie Chaille's mother, testified after an order of the court granting her immunity from prosecution. She stated that after learning of Valerie's pregnancy and agreeing to help her, she got in touch with a Virginia Vance who gave her a telephone number at which she could contact defendant, Ruth Bawden. She called a number, which she recalled followed a CLinton prefix, and discussed with defendant the pregnancy and the possibility of an abortion. Later she received a call from a man who identified himself as a doctor; and subsequently, after a call from "Edith" during which arrangements were agreed upon including the fee of $450, she received a further call from the doctor in which he agreed to go ahead with the abortion under the arrangements Edith had made. She and her daughter met Edith who took them aboard a yacht which was operated by Danny Dyer to whom she paid the fee of $450.

Virginia Vance, the wife of Valerie Chaille's father, testified after an order of the court granting her immunity from prosecution. She stated that in January of 1960 Marian Springer called her and informed her

that they had decided to terminate Valerie's pregnancy. Mrs. Vance agreed to help and gave Mrs. Springer a CLinton telephone number where she could contact "Ruth." Mrs. Vance had obtained this telephone number at the time of a previous abortion in which she had participated. She identified a piece of paper bearing the telephone number CLinton 5-6749 and the name of Ruth Bawden as the one she received in connection with the previous abortion.

Leon Greenhill previously entered a plea of guilty and was ordered to testify at the trial. He stated that he received information that Miss Faulkner desired an abortion from defendant Ruth Bawden, whom he had known for about four or five years. Defendant gave him the telephone number and asked him to contact Miss Faulkner. On January 6, 1960, he performed an abortion upon Miss Faulkner aboard the yacht "Westerly." He also received information concerning Valerie Chaille from defendant who gave him the name and telephone number of Valerie's mother whom he contacted in order to make arrangements for the abortion upon her daughter. He paid one half of the net receipts from these two abortions to defendant. He estimated that defendant had referred about twenty abortions to him during the period between December 15, 1958, and the date of the arrest.

The yacht "Westerly", located at the anchorage at Long Beach, had been under surveillance by police officers for approximately two months prior to defendant's arrest. The police officers had observed and photographed a number of persons who entered the yacht, and among these persons were Dorothy Faulk-

ner and codefendants Leon Greenhill, Edith Dyer and Danny Dyer. Police officer Fred Mitchell testified that after the arrest of Edith and Danny Dyer, he questioned Edith Dyer en route to the police administration building. She told him that she became involved in this enterprise after having obtained an abortion for her sister through defendant Bawden about one year prior to the date of this arrest. Following the abortion on her sister, the Dyers agreed to assist by picking up women and bringing them to the place where the abortions were to be performed. The Dyers had purchased the yacht "Westerly" upon which the abortions had been performed about eight months prior to the date of arrest. Mrs. Dyer told the police officers that defendant Bawden was at the head of this operation. Officer Mitchell testified, "I related this information to my lieutenant upon arriving at the Police Building, and he immediately ordered Sergeant Le Page and Hille to go to the residence of Mrs. Bawden and to place her under arrest." Prior to this order of arrest, the officers had checked the records of the telephone company which indicated that defendant had been in communication with the yacht anchorage where the abortions were being performed. Defendant and codefendant Greenhill had previously been convicted together for performing abortions, and both of them were presently on probation.

It was stipulated that there was no warrant for arrest of defendant nor a search warrant. The two police officers went to defendant's home, were admitted, and placed her under arrest. They searched the house and seized a telephone directory, a personal address book and a few slips of paper which they believed to have

evidentiary value. The items taken from defendant's home were entered into evidence as exhibits. There was a partial erasure of the telephone number of the yacht anchorage which had been written in the telephone book. A qualified expert testified that in his opinion the name of one of the abortees, Jean Faulkner, on one of the exhibits was written by defendant.

Defendant testified in her own behalf. She denied that she had participated in or received any profits from any of the abortions. She admitted receiving money from codefendant Greenhill's wife, but stated this was the return on a $350 loan she had made to Mrs. Greenhill to have her little girl's teeth straightened. She admitted talking on the telephone to Valerie Chaille's mother who she said only asked, "Is this the right number for Dr. Greenhill?" She also admitted the telephone conversation with Margolis but stated that he merely called her to confirm the accuracy of Dr. Greenhill's number. She admitted writing the telephone number of the anchorage which had been written in the telephone book but stated she had never called that number. An employee of the telephone company testified that the number formerly listed to defendant was CLinton 5-6749 and that her present number is CLinton 5-7913.

In order to sustain a conviction of the crime of abortion the testimony of the woman upon whom the abortion has been performed and the testimony of accomplices must be corroborated by other evidence. (Pen. Code §1108.) Defendant contends that there was not sufficient corroboration of the abortees' and accomplices' testimony in this case.

"Corroboration is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the woman is telling the truth. [Footnote and Citations.] It has been held that the corroborative evidence need not by itself establish that the crime was committed or show all the elements thereof, but it must relate to some act or fact which is an element of the offense. [Citations.] It must create more than a suspicion, but it may be sufficient even though slight and entitled to but little consideration when standing by itself. [Citations.]

"A woman who has submitted to an abortion is not an accomplice of the persons charged with procuring or conspiring to procure the miscarriage. [Citations.] The testimony of any one of the [abortees] can be corroborated by that of a witness who was an accomplice. . . . and the testimony of the accomplice can be corroborated by that of any one of the [abortees]. [Citations.]" (*People v. Gallardo*, 41 Cal. 2d 57, 62.)

While we have heretofore summarized the testimony adduced at the trial, testimony of one of the abortees, Dorothy Faulkner, is corroborated by the testimony of codefendant Greenhill in that he received Miss Faulkner's name and telephone number from defendant Bawden, and he gave one-half of the net profits from that abortion to defendant. There was further corroboration by the testimony of Allan Margolis. Police officer Fred Mitchell testified he saw Miss Faulkner and photographed her as she went on board the yacht "Westerly" for her abortion. There was a slip of paper taken from defendant's home which had the name of Jean Faulkner written in the handwriting of de-

fendant. The testimony of the other abortee, Valerie Chaille, was corroborated by the testimony of her mother and stepmother.

Defendant next contends the evidence was not sufficient to establish any of the counts of which defendant-appellant stands convicted. Concerning the conspiracy charge, "Direct evidence is not required to establish a conspiracy, but circumstantial evidence may be relied upon. This rule is sanctioned for the obvious reason that experience has demonstrated that as a general proposition a conspiracy can only be established by circumstantial evidence. '". . . It is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design [citation]; and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan . . . for the execution of the conspiracy (citing authority.)' [Citation.]'" (*People v. Massey*, 151 Cal. App. 2d 623, 651.)

Without a further review of the facts it is obvious that the finding of a conspiracy to commit abortion and the abortion as well as defendant's participation therein are supported by substantial evidence which was considered by the trier of fact.

Defendant's final contention is that the search of defendant's home and the seizure of the telephone book and memorandum and the use thereof in the trial violated both the Fourteenth Amendment of the Constitution of the United States and Article I, Section 19,

of the California Constitution, in that the search was made without a search warrant and not incident to a valid arrest.

"Penal Code Section 836 states: 'A peace officer may make an arrest . . . without a warrant . . . 3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.' Reasonable cause is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime. In considering the question of reasonable cause for the officer to act, the court looks only to the facts and circumstances presented to the officer at the time he was required to act. (*People v. Ingle*, 53 Cal.2d 407, 412, 414. . . .)" (*People v. Luckman*, 198 Cal. App. 2d 347, 352.)

However, the legality of an arrest does not determine the lawfulness of a search incident thereto. (*People v. Brown*, 45 Cal. 2d 640, 643.) "[T]he reasonableness of a search is not to be justified by what the search turns up 'but by appearances to the searcher at the time of his action.' So long as the officer reasonably evaluates these appearances and acts accordingly the rights of the accused are adequately safeguarded." (*People v. Sanson*, 156 Cal.App.2d 250, 254.)

The evidence, as we have stated before, shows that there was probable cause to believe defendant guilty of the crimes as charged in the indictment. The officers in making this arrest had received information concerning this defendant's involvement in the illegal activity. They knew of her prior conviction of a conspiracy to commit abortions with the same parties now

under suspicion. They had checked her telephone number which was the same as had been used for contacts by persons seeking abortions.

Defendant in appealing from the order revoking probation contends that in the event the appeal from the judgment of conviction were to be reversed the judgment revoking probation would also have to be reversed. This does not follow, because often circumstances not warranting conviction may fully justify a court in revoking probation on a prior offense.

"In Section 1203 of the Penal Code (1203.2 as amended) it is provided that the court is authorized to revoke an order for probation if there is reason to believe from the report of the probation officer or otherwise that the defendant had violated the terms of his probation. The discretion of the court to revoke an order of probation is 'very broad'. [Citation.] No formal procedure is provided for presenting charges of violation of probation. The court may make an order revoking probation based upon facts presented in an informal charge from which the court has reason to believe that the defendant had violated his probation or is unfit to be at large. [Citation.]" *(People v. Silverman*, 33 Cal. App. 2d 4, 5.)

The judgment of conviction, orders denying motion for a new trial and revoking probation and judgment pronounced thereon are affirmed.

JEFFERSON, *J.*

We concur:

BURKE, *P. J.*

FORD, *J.**

*Assigned by Chairman of Judicial Council.